

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Paul S. Grewal, Magistrate Judge

GSI Technology, Inc.,

Plaintiff,

vs.

United Memories, Inc.,

Defendant.

No. CV13-01081 PSG

San Jose, California
Thursday, March 28, 2013

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING

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1 Thursday, March 28, 2013

9:56 a.m.

2
3 **THE CLERK:** Calling GSA Tech -- GSI Technology, Inc.
4 versus United Memories, Inc., Case Number CV13-1081 PSG.

5 Matter on for Plaintiff's ex parte application for
6 temporary restraining order, order to show cause regarding
7 preliminary injunction, and expedited discovery in the
8 alternative.

9 Counsel, please state your appearances.

10 **MR. SHOHET:** Good morning, Your Honor. Jeffrey
11 Shohet, DLA Piper, appearing for the Plaintiff in this matter.

12 Also appearing with me is Mr. Chris Beal and Didier
13 Lasserre who works with the company as counsel for Plaintiff.

14 **THE COURT:** Good morning, counsel.

15 **MR. SHOHET:** Thank you.

16 **MR. CHERIAN:** Good morning, Your Honor. Korula
17 Cherian for UMI.

18 **THE COURT:** Mr. Cherian, good morning to you as
19 well, sir.

20 **MR. CHERIAN:** Thank you.

21 **THE COURT:** All right. Gentlemen, I wanted to begin
22 by just noting that although we do not have the benefit of a
23 court reporter this morning, we are recording this morning's
24 proceedings, so in the event a transcript is necessary, you
25 will be able to request one. I just wanted to make that very

1 clear.

2 I have in front of me a motion for a TRO. Actually,
3 it's an ex parte application for TRO, but we're, obviously,
4 all well aware that counsel is present for both -- both sides.

5 I'd like to begin with the Plaintiffs, since this is
6 their request, and obviously, I'm going give Mr. Cherian a
7 full opportunity to respond as well.

8 **MR. SHOHE:** Sure, Your Honor. Thank you very much.

9 **THE COURT:** Go ahead, sir.

10 **MR. SHOHE:** May it please the Court, I think our
11 papers -- we spent some time on our papers, and I think our
12 papers completely set forth our position in this matter.

13 I want to take the time to respond to a few of the
14 issues that came up in the Defendant's opposition brief.

15 **THE COURT:** Go ahead, Mr. Shohe. The floor is
16 yours.

17 **MR. SHOHE:** Thank you. So I want to start by
18 setting the stage with the contractual provisions that we
19 relied upon for the relief that we've requested.

20 And there are really three prongs to the contract,
21 and they operate in many ways to accomplish the same result,
22 which is protect the valuable IP of our client, but they do it
23 in different ways, and I think there's been some confusion in
24 the Defendant's papers on this, and I want to make it clear.

25 The three prongs are the -- what we call the

1 noncompete obligation, which is set forth in Paragraph 3.6 of
2 the agreement.

3 There's the confidentiality obligation, which is set
4 forth in Article XI, generally. There's several provisions.
5 The definition of confidential is in 1.1 of the contract.

6 And then there's the provision declaring the
7 ownership of the intellectual property to be the owner -- to -
8 - to be in GSI, our client.

9 Now, they operate differently, and I want to -- I
10 think it's important to make it clear. Although I think it's
11 pretty obvious, but I think it's important just to set the
12 stage and be sure we all understand.

13 The noncompete is a fairly simple and objective
14 provision. It doesn't require any findings of any particular
15 harm. It doesn't require a determination that there's any
16 confidential information that's actually being used. It
17 stands on its own.

18 And it provides that for the term of the contract,
19 which is defined in the contract and is -- and operates
20 through the end of this this month, through April 30, May 1,
21 for the term they simply they cannot engage in an LLD RAM
22 project for their own account or for any person's account,
23 period.

24 **THE COURT:** And -- and as I read the -- the term and
25 understand your position, the LLD RAM product, as defined in

1 that clause, is not specific to one particular flavor or
2 species or LLDRAM.

3 **MR. SHOHEIT:** Correct. It's an L --

4 **THE COURT:** Is that correct?

5 **MR. SHOHEIT:** Exactly right. The definition is in
6 the contract, and it talks about the performance
7 characteristics of an LLDRAM as the definition of an LLDRAM
8 project.

9 But of course, it's -- that is the only requirement
10 is that they not compete, meaning not get engaged in, for
11 their own account or others, design work in connection with an
12 LLDRAM, period, and that runs until the end of April.

13 And by the way, I should mention that the case law
14 would support the notion that if you engage in a violation
15 within that period of the operation of the noncompete, then
16 that violation and the injunction that attaches to it extends
17 beyond the expiration of the noncompete. We cite cases for
18 that proposition, Your Honor.

19 Then you have the confidentiality obligation. The
20 confidentiality obligation -- oh, and I should mention that,
21 just to, again, set the table. I know it's in the papers.

22 **THE COURT:** Uh-huh.

23 **MR. SHOHEIT:** That the noncompete is -- lasts for the
24 term of the contract, which was set at five years from the
25 inception or April 30. That's the end of the term of the

1 contract.

2 That's a reasonable period of time, we would
3 suggest, and it's a period of time that the parties agreed to
4 as reasonable. So I think it -- it's a presumption that
5 that's a reasonable period of time for the broader policy
6 questions about how long a noncompete should operate.

7 Then we have the confidentiality provision. The
8 confidentiality provision prevents them from using,
9 exploiting, disclosing confidential information specifically.

10 So this is a different version, in that it's a
11 little more narrow and requires a more of a showing of the
12 underlying harm, that is the use of the confidential
13 information, but under the survival provision that can last
14 beyond the termination of the contract and for a period of ten
15 years.

16 **THE COURT:** And this particular obligation is
17 mutual, correct? At the same time as they are precluded from
18 utilizing any of your confidential information, I take it
19 under this -- under this provision, you are similarly barred
20 from using --

21 **MR. SHOHEIT:** I don't --

22 **THE COURT:** -- any of theirs?

23 **MR. SHOHEIT:** It's a fair question, Your Honor.
24 That's not how I read the provision.

25 **THE COURT:** It does say "each party."

1 **MR. SHOHE:** Yeah.

2 **THE COURT:** And it talks about receiving and
3 disclosing parties, so isn't that indicative that there's a
4 mutual, binding obligation here?

5 **MR. SHOHE:** Well, I mean, each party has
6 responsibilities in the performance of that provision. I
7 would say it this way, though, because all of the IP -- we
8 call the GSIP -- all of the product of the work that is being
9 done is our property, which means everything that's done
10 during the course of that project, the developments, the
11 innovation, the IP that's generated, the know-how, that
12 belongs to us. That's our IP. And that's what's being
13 protected by the confidentiality obligation.

14 **THE COURT:** I tend to read that provision in the
15 same way as you do, but it would seem to me conceptually each
16 party could bring to this marriage, relationship, set of
17 dates, however you want to characterize it, each party could
18 bring to it each own confidential information. The net or the
19 resulting work product, as you read it, all belongs to you.

20 **MR. SHOHE:** Right. I think that's a -- Your Honor,
21 I hadn't thought about it the way you just did, but I think
22 it's a fair interpretation --

23 **THE COURT:** It may not be relevant --

24 **MR. SHOHE:** -- of that.

25 **THE COURT:** -- to your claim here today but --

1 **MR. SHOHE:** That's the point.

2 **THE COURT:** Yeah.

3 **MR. SHOHE:** I'm not -- I'm not sure it's -- I
4 didn't mean to cut you off. I'm sorry.

5 **THE COURT:** No. I was only going ask. I just
6 wanted -- before we get to the claims themselves, I just want
7 make sure I'm reading the language properly.

8 And I -- I -- I take it you don't see this as
9 material to your claim, even if it is true that you have
10 certain obligations under Section 6.1 as well?

11 **MR. SHOHE:** No. And I -- I think it's a fair
12 reading, if -- were they to bring some specific confidential
13 know-how technique or property -- intellectual property, then
14 I could -- I could see in the hypothetical the reading of the
15 contract the way the Court reads it.

16 But I say this: They brought nothing to the
17 project. This is the first LLDRAM project that they had
18 worked on that -- whatever value they created for themselves
19 in the learning and skill in -- in -- in -- in provide design
20 services was acquired up through our -- through the projects
21 that they worked on with us. We were the first.

22 So I would say hypothetically that's probably right,
23 but in the practical world, at least before we get into the
24 trial and the discovery, at this stage I think it's a fair
25 presumption to make that the way the stage is set they really

1 didn't have anything that was protected under that.

2 **THE COURT:** All right.

3 **MR. SHOHET:** So we talked about the confidentiality
4 provision. And I can see that I don't have spend too much
5 time going through these because the Court's --

6 **THE COURT:** No. No.

7 **MR. SHOHET:** -- familiar with it.

8 **THE COURT:** Take whatever time you need. I want to
9 make sure I understand each side's position clearly.

10 **MR. SHOHET:** Thank you.

11 Then the other provision that I think is a prong
12 that's important is the ownership provision itself, 3.1. 3.1
13 -- I think it's interesting to think about 3.1 because 3.1
14 says whatever is done in this project belongs to us, whatever
15 innovations, whatever IP is generated.

16 And so -- so the -- the significance of that to me
17 is it means that all of that is confidential, regardless of
18 whether it's marked confidential or not. And I can talk about
19 that in a second. There was an opportunity to mark specific
20 documents or tangible things as confidential and protect --

21 **THE COURT:** So as to resolve any doubt at all?

22 **MR. SHOHET:** As to resolve doubt, but there's the
23 provision that says, "But obviously things that are reasonably
24 known by the party to be confidential are confidential."

25 And since it's declared that everything that's done

1 is our property, and our property becomes part -- that -- that
2 would -- that would give them fair notice that that's also
3 confidential because it belongs to us, and without our
4 permission, you shouldn't be disclosing our valuable IP.

5 So I want -- that's our reading of that, and I think
6 it's important that we all understand how these various
7 provisions work together.

8 For my purposes, therefore, everything that was done
9 on the project that had any value because it was our property
10 was also confidential and, therefore, could not be used by
11 them in the exploitation -- could not be used by them because
12 of the protections that property has under the confidentiality
13 provision.

14 **THE COURT:** But -- but, counsel, would you agree
15 that, as we were discussing a minute ago, it is entirely
16 plausible, perhaps even likely, that your client brought to
17 this relationship certain confidential information, but also
18 certain general know-how that is not proprietary to your
19 client, but that the other side may not have understood prior
20 to the relationship?

21 **MR. SHOHET:** Absolutely.

22 **THE COURT:** Okay. And if that's the case, it would
23 seem to me if it's ex-ante general know-how that under the
24 terms of -- of the contract that's not information, which they
25 are precluded from using in any future commercial activity.

1 **MR. SHOHET:** They, our client, or the --

2 **THE COURT:** I'm sorry. I'm ambiguous in my use --

3 **MR. SHOHET:** Okay.

4 **THE COURT:** -- of the word "they." I meant the
5 Defendant.

6 **MR. SHOHET:** Well, I suppose, Your Honor, that if
7 it's going to be become IP protected by virtue of the
8 ownership provision of the contract, it has to be --

9 **THE COURT:** Well, but the --

10 **MR. SHOHET:** Yeah.

11 **THE COURT:** -- but the IP ownership clause relates
12 specifically to deliverables and the product. It doesn't
13 speak to nonproprietary general know-how that your client may
14 have brought to this series of engagements.

15 **MR. SHOHET:** Well, I suppose -- okay. So I suppose
16 that's probably right. I hadn't thought about it, but if our
17 client had been in -- in -- because -- because of its
18 participation in these projects had general know-how, but it
19 wasn't something that was particularly confidential or
20 proprietary because it was generally known, then that probably
21 would not rise to something that would qualify as confidential
22 information or something that we would claim ownership rights
23 to. I would agree with that.

24 **THE COURT:** Okay. Nevertheless --

25 **MR. SHOHET:** I think in the hypothetical I would say

1 that. I'm not sure -- the answer -- I think I've answered
2 your question.

3 **THE COURT:** Okay. So -- so -- and again, I -- I
4 appreciate that your -- your reason for coming into court this
5 morning is you believe that there's information at -- at -- at
6 issue here that clearly falls within the scope --

7 **MR. SHOHET:** Well --

8 **THE COURT:** -- of either the ownership or the
9 confidential? I want to make sure.

10 **MR. SHOHET:** You know, it's a fair question. And
11 the point is we come into this a little blind. You know, we
12 haven't had any discovery yet on what they're actually doing,
13 so we don't really know what specific techniques or
14 innovations or -- or skills they're bringing to the -- to the
15 projects they're working on.

16 We do now know from their papers that they are
17 violating those provisions, that is that they are engaged in a
18 project. They wouldn't answer that question. We know at
19 least that much. They could have told us that in the letter
20 that we wrote that they responded to us.

21 The first indication that we actually knew, we had a
22 suspicion, was when we saw in their papers where they said
23 will they be forced to be breeching "contract or contracts" if
24 the -- if the injunction was issued.

25 And since the injunction only applies to projects

1 that they're engaged in that involve LLDRAM, which is the
2 definition predicate for the noncompete --

3 **THE COURT:** Uh-huh.

4 **MR. SHOHEIT:** -- they are -- they are engaged in --
5 in -- in -- in projects that would violate the noncompete,
6 absent whatever defenses that they raise.

7 **THE COURT:** I wanted -- I interrupted you, so I want
8 to go back to the point you were -- or just to complete the
9 point you were addressing on ownership.

10 So as I understand it, if we're talking about
11 activity during the relationship, which I take it from my
12 timeline is sometime in 2008 --

13 **MR. SHOHEIT:** May of 2008.

14 **THE COURT:** May of 2008?

15 **MR. SHOHEIT:** That's correct.

16 **THE COURT:** Okay. During -- let's assume we're
17 talking about the -- the -- the several months where, as I
18 understand it from your papers, one or more of your engineers
19 was working with the Defendant to get the LLDRAM II project up
20 and running?

21 **MR. SHOHEIT:** That's right.

22 **THE COURT:** During the course of that activity, your
23 view would be that any IP generated would certainly belong to
24 you and you alone?

25 **MR. SHOHEIT:** That's true.

1 **THE COURT:** But that the ownership clause goes
2 beyond just patents, copyrights --

3 **MR. SHOHET:** Yes.

4 **THE COURT:** -- etcetera? It actually relates to any
5 information fixed in a --

6 **MR. SHOHET:** Yeah. I think the --

7 **THE COURT:** -- in a tangible medium?

8 **MR. SHOHET:** -- the definition -- well, since
9 (inaudible), but yes.

10 **THE COURT:** Okay.

11 **MR. SHOHET:** It says, you know, we're bringing you -
12 - I guess in real life terms --

13 **THE COURT:** Yeah.

14 **MR. SHOHET:** -- as human beings behaving to try to
15 be reasonable with each other but protect themselves, the way
16 I would describe it is, "Look, we're bringing you into a new
17 world as our contract. You've not been -- you've done DRAM
18 projects, but they're pretty generalized, you know, kind of
19 commoditized. This is now where the game is now being played.
20 This is, you know, above the RAM work."

21 **THE COURT:** Yeah.

22 **MR. SHOHET:** "And we're ahead. We're -- we're --
23 we're fair up the food-chain, but we'd like to have your help.
24 You bring some unique skills and design skills to the table,
25 but we want to protect ourselves from, you know, competing

1 with you for some reasonable period of time, and from having
2 to face you in the competitive marketplace, which apparently
3 we now are, having disclosed things to you that are of value."

4 **THE COURT:** And -- and among the things or assets
5 that the Defendant brought to this relationship, in your view,
6 was their relationship with this -- with the fab, with ProMOS?

7 **MR. SHOHET:** Yes. That was an important part of the
8 deal is they -- they -- because the work -- the design work
9 would require two -- first thing, as we say in the papers --
10 and I'm probably saying something because I can see how
11 familiar the Court is with this stuff, but just to be sure --
12 the design work that goes on for a particular chip is specific
13 to the fab in which it is going to be manufactured.

14 **THE COURT:** Right.

15 **MR. SHOHET:** So the first point is if you're going
16 to start down the road of designing a chip, you need to know
17 the processes and the protocols and the design requirements
18 for the fabrication of that chip. You can only do it with a
19 single fab.

20 Secondly, even before you get to the manufacture of
21 the chip for the customer, the testing work and the proving of
22 the specification requirements of the chip in the milestone
23 phases, which were the next milestone actually -- the fifth
24 milestone -- we'd gone through one through four -- actually
25 required that you have a chip that -- and the chip has to be

1 manufactured by the fab in accordance with the design of the -
2 - of that chip to complete that phase.

3 So the fab is important, not only for the ultimate
4 manufacture and sale of the chip, but for --

5 **THE COURT:** But for some of the initial milestones -
6 -

7 **MR. SHOHEIT:** Yeah.

8 **THE COURT:** -- or intermediate milestones as well?

9 **MR. SHOHEIT:** Or for the next milestone.

10 **THE COURT:** Right. Right.

11 **MR. SHOHEIT:** And so that's why -- you know, that
12 explains -- you know, they make a big point about this, and
13 I'll get to it, but they make a very big point -- and it's
14 kind of -- I don't understand it, Your Honor. I have to say,
15 it doesn't make any sense to me. I don't mean to be
16 dismissive or derogatory, but they say this point that we've
17 had no contact since 2009 when they wrote their purported
18 termination of the contract.

19 And the point -- and now all of sudden we come
20 running to court, as if this is a big surprise, because
21 nothing has happened since 2009. The contract was supposed to
22 be done in 2009. There wasn't supposed to be anymore work on
23 the contract by 2009.

24 The period of time extending the contract to April
25 30 was precisely to define and protect the noncompete

1 provision. It said the term is going to be until 2013, but
2 that's not going to be any work to be done. The work is all
3 over in 2009 and --

4 **THE COURT:** And since you -- since you've turned to
5 2009, I want to just speak to that time period as well, or ask
6 about that, if I could?

7 **MR. SHOHET:** Sure.

8 **THE COURT:** I take it that the last communication in
9 2009 that was exchanged between the parties was a letter from
10 UMI to your client.

11 From that, I -- from your comments just now, I -- I
12 understand as well that sometime prior to that you got word
13 from the customer that this opportunity wasn't going to
14 happen; is that -- I'm characterizing it.

15 **MR. SHOHET:** No. Well --

16 **THE COURT:** But tell me -- tell me where I have it
17 right or wrong.

18 **MR. SHOHET:** Well -- well -- well, what -- well, you
19 may be right, but that's not our position or we're not
20 standing on that. I'm not sure about that. What happened is
21 --

22 **THE COURT:** Yeah. That's really what I'm just
23 trying to figure out --

24 **MR. SHOHET:** Okay.

25 **THE COURT:** -- is what happened.

1 **MR. SHOHE:** What -- what -- what happened is that
2 in December of 2008 we began to understand that ProMOS, the
3 fab, that is the parent of UMI, was having -- I believe it's
4 in Taiwan -- was having very severe financial problems. There
5 was solvency issues, and that was public. That came out in
6 the news reports.

7 Now, because -- if we're going to go down any
8 further on this contract, A, we need a fab to make the wafers.
9 We didn't issue the wafer starts. They call that a breach on
10 our part. We -- we were the -- we were the bad guys.

11 **THE COURT:** You would call that throwing good money
12 after bad?

13 **MR. SHOHE:** That's what we do -- yeah, we wouldn't
14 call it that. It is that, because for -- the fact is that you
15 got to have a fab to do the work to complete the milestones,
16 and that's also got to be the fab that you want to use to
17 manufacture the chip.

18 Why would we take one step further in this project
19 until that was resolved? And it never was resolved.

20 **THE COURT:** And since -- since you directed us on
21 the timeline back to December of 2009, as I understand --

22 **MR. SHOHE:** December 2008.

23 **THE COURT:** I'm sorry, December 2008.

24 As I understand it, at that same time as you're
25 coming to learn of potential solvency issues with ProMOS,

1 you're engaging in some design review meetings with the other
2 side? In other words, the timeline is a little bit fuzzy to -
3 - in my mind.

4 **MR. SHOHET:** I think not, Your Honor. I don't know.
5 It's not in the papers. Let me tell you what I do know.

6 **THE COURT:** Yeah.

7 **MR. SHOHET:** I don't want to speculate on what I
8 don't know. What I do know is at that point milestone 4 had
9 been all but completed. I think it was complete.

10 **THE COURT:** Right.

11 **MR. SHOHET:** The next milestone was us -- was -- was
12 -- the next step forward was to go down to milestone 5, which
13 required --

14 **THE COURT:** Which was a January 20, 2009 --

15 **MR. SHOHET:** Correct. That would require --

16 **THE COURT:** -- requirement?

17 **MR. SHOHET:** -- us to actually issue the wafer
18 starts, which was our obligation under the contract --

19 **THE COURT:** Right.

20 **MR. SHOHET:** -- and they make a big deal about that,
21 but that would require -- then there's -- that would then set
22 up the fabrication of the chip for testing purposes. Again,
23 this is my understanding. I'm not an engineer. This is a
24 simple kind of my -- my view of it.

25 And so what happened at that point is the solvency

1 issue became on the table, and we were have -- then we entered
2 into discussions with UMI about that.

3 We take the position that it was their obligation,
4 since they presented the parent company as the reason we
5 should hire them so that we could get this work done, both for
6 the testing phase and for the ultimate manufacture of the
7 chips, but regardless of whether it was something that was
8 just a failure of a -- of -- of a condition that was
9 presupposed, but where nobody was -- it doesn't constitute a
10 breach or whether it was their breach, which we think it was,
11 the fact is it stopped the project and reasonably so.

12 In fact, the parties agreed at that point. And we
13 will offer into evidence if we ever get into a trial emails
14 and other communications that demonstrate that we all
15 understood it didn't make any sense to go forward at that
16 point. The project was stopped. That was the end of it, from
17 our point of view. We went our --

18 **THE COURT:** And it --

19 **MR. SHOHEIT:** We went -- we went away.

20 **THE COURT:** And as I understand your earlier point,
21 the project stopped basically in January of 2009 or
22 thereabouts?

23 **MR. SHOHEIT:** Right.

24 **THE COURT:** A few months later, July 2009, you get a
25 letter from them purporting to terminate, but in your view

1 both because the project had stopped in '09, and even if the
2 project had continued and been fished, the relationship was
3 anticipated to be done in '09?

4 **MR. SHOHEIT:** The relationship was done, but that
5 didn't relieve them of their obligations of the noncompete.

6 **THE COURT:** Right.

7 **MR. SHOHEIT:** And that's right, Your Honor. And
8 that's -- you're -- you're exactly right. That is what --
9 what was going on is at this point we were kind of surprised
10 to get that letter because we had gone our way.

11 And we actually started to work on the design work
12 in-house to pull that in -- to try to salvage something out of
13 this project so, you know, we went on with it, but we didn't
14 think we needed to have anymore discussions with them.

15 And we were surprised when they sent us that
16 termination letter, and we sort of ignored it. We said,
17 "Well, you know, you're purporting to terminate. You claim we
18 breached. We didn't really breach, and if it's going to be a
19 breach, you got get us to sign it. And we're supposed to have
20 a meet and confer, but you know, come on. We're busy people.
21 What's the point? You're going your way. We're going our
22 way." So you know, they make a point of us, I don't know --

23 **THE COURT:** And in the -- I'm sorry to interrupt
24 you.

25 **MR. SHOHEIT:** That's okay.

1 **THE COURT:** I was wanting to ask, in the termination
2 or purported termination, in your view, which was tendered in
3 July of '09, did they point to the failure to deliver the
4 wafers as essentially the -- the key breach, which gives rise
5 to the termination?

6 **MR. SHOHET:** They didn't say that in the letter. I
7 -- I'm -- the -- that came up, you know, when I sent them the
8 letter a few months ago in January.

9 **THE COURT:** Oh, okay.

10 **MR. SHOHET:** Then they came back. We started to
11 debating a breach. No, that didn't come up. Their letter
12 just said, "We hereby terminate the contract. It's apparent
13 that there's" -- something like that. Well, it's very simple.

14 It says -- this is the letter of July 20, 2009, and
15 it says, "It's apparent that the intent of the agreement no
16 longer exists. That GSA does not plan to satisfy Condition
17 11.26," throwing it on us. That somehow 2.2, which was our
18 obligation to give them the wafer starts so they could then do
19 --

20 **THE COURT:** Okay. So they at least flagged it. I
21 don't know if it matters one bit to your --

22 **MR. SHOHET:** Yeah.

23 **THE COURT:** -- claim, but I just wanted to make sure
24 that their -- this issue of wafer delivery was -- was at least
25 raised.

1 In your view, again, it would make no sense to send
2 wafers to a -- to a -- to a partner that didn't have access to
3 a fab because the fab was bankrupt?

4 **MR. SHOHEIT:** Well, not only that, but we had
5 discussed that. We had discussed it, and we will offer
6 evidence of that, but we say it in our work papers and we got
7 the -- there were discussions about the implications about
8 ProMOS's insolvency.

9 And the parties kind of agreed that, "Well, you
10 know, I get your point. We can't do the design work, so
11 there's really no reason for us to issue wafer starts." I
12 can't represent to the Court that it was that clear, having
13 seen those documents.

14 **THE COURT:** Yeah.

15 **MR. SHOHEIT:** But I can represent to the Court that
16 there was discussion, and the outcome of that discussion is,
17 "We're kind of done for now." Maybe ProMOS could get itself
18 healthy and something could happen in the future, but we
19 started to pull the design in-house at that point to try to
20 salvage what had become a terrible situation for the
21 investment we had made.

22 We paid \$540,000 that we had washed down the drain
23 at that point. We were going to salvage that, but there was
24 nothing more to do with them, so we didn't see any need to
25 respond to the letter. I think they call that laches or some,

1 you know, delay on our part or something.

2 I mean, in -- in the world where human beings do
3 their business, human -- our -- I -- I don't think our client
4 had any reason or obligation to respond to that letter --

5 **THE COURT:** So --

6 **MR. SHOHEIT:** -- given the situation.

7 **THE COURT:** So as I -- as I understand it from
8 there, as you indicated, some -- some effort was made to try
9 to do the design in-house. It turns out that was not
10 successful. The bid is awarded to somebody else?

11 **MR. SHOHEIT:** I mean, you know, I -- I haven't
12 followed the thread much beyond that.

13 **UNIDENTIFIED SPEAKER:** Different families. That's
14 LL II versus --

15 **MR. SHOHEIT:** Right. That the end of -- yeah, of the
16 LL II. We started to pursue -- we went back to the LL III
17 protect, which -- and I can get into that. It's a
18 complication. It's not well developed in our papers, but if
19 the Court is interested, the answer is it never really went
20 anywhere, the LL -- the LL II project, or did it? Where did
21 that end up?

22 **UNIDENTIFIED SPEAKER:** The LL II we brought in-house
23 and had to redesign it to a new fab that was --

24 **MR. SHOHEIT:** Right.

25 **UNIDENTIFIED SPEAKER:** -- had not become insolvent.

1 **MR. SHOHE:** But do we have -- we don't have an LL -
2 - we had an LL II project after the -- that's now --

3 **UNIDENTIFIED SPEAKER:** That we are just now
4 sampling.

5 **MR. SHOHE:** Okay. There's the answer to your
6 question.

7 **THE COURT:** Okay.

8 **MR. SHOHE:** The LL II project, they went in-house.
9 They had to get a new fab. They did. And they are just at
10 the point of being able to offer that, but they tried to
11 salvage it, but that was the contract.

12 Now, the LL III one is the one that we're now, you
13 know, which -- and it's interesting because they were
14 consulting with us on the LL III project before LL II.

15 And then we switched them to LL II as a kind of
16 training ground for that and -- and now we find -- I think, we
17 haven't heard it yet -- I'm surprised they didn't tell us in
18 the letter what they're doing, if they think it's legal, and
19 I, quite frankly, have to say, Your Honor, I'm surprised they
20 didn't disclose it in their papers. They all but disclosed
21 it. But they continue to refuse to tell us what they're doing
22 and with who they're doing it.

23 **THE COURT:** Since you -- you addressed the
24 distinction between LL II and LL III, I want to make sure I
25 appreciate this.

1 What I don't quite understand from the papers is the
2 -- is -- is the -- is the relationship or the nature of the
3 work in LL II and how it compares to the LL III opportunity
4 that followed.

5 **MR. SHOHE:** Well, the LL III came up first.

6 **THE COURT:** Right.

7 **MR. SHOHE:** They were engaged and -- and -- and the
8 -- the customer Cisco on the LL -- on the LL -- they -- they -
9 - they criticized for not naming the customers in the papers.
10 They're name doesn't matter, and I didn't see any reason to
11 drag the names of other folks involved in this into this
12 record and dispute, but it was Cisco that was involved in the
13 LL III project, which goes back to July of 2007, and maybe
14 even before, so it's before the LL III -- LL II project became
15 an opportunity for them.

16 That's a much more complicated project, and since
17 this was their first project, as we were talking with them --
18 and they actually attended meetings in California with Cisco
19 and were working with us to -- to -- to try to, you know,
20 position for the LL III work as a second source.

21 Then the LL II project, which is not for a customer.
22 That was just something we were doing specific --

23 **THE COURT:** Oh, that's an important question.

24 **MR. SHOHE:** Yeah.

25 **THE COURT:** So I wanted to understand.

1 **MR. SHOHET:** Yeah.

2 **THE COURT:** So the -- the customer, now we've
3 identified them as Cisco. Cisco was not the customer for the
4 LL II work?

5 **MR. SHOHET:** There was no specific customer, but
6 that --

7 **THE COURT:** You, in some sense, were the customer or
8 there --

9 **MR. SHOHET:** We -- we were making a part that we
10 thought the industry would --

11 **THE COURT:** For broader market?

12 **MR. SHOHET:** Exactly.

13 **THE COURT:** Got it. Okay.

14 **MR. SHOHET:** And so we brought them to that, and
15 precisely because, I guess -- and I hadn't thought about this,
16 but because there wasn't a specific customer who we had to
17 satisfy, we were the customer, it would be a great opportunity
18 for us to work with them to develop their expertise to help
19 them understand what it would be because the world is a much
20 more rigorous place when you are a contractor to a customer
21 and you have a subcontractor on whom you depend to deliver
22 that performance to the customer.

23 So that was the LL III project. So it was more
24 complex, and the success or failure -- or put it another way.
25 If this ProMOS meltdown had occurred while Cisco was expecting

1 us to be a second source to them by a date certain, our
2 client's name would be a lot worse in the industry than if it
3 was just a meltdown as it was on the LL II project where we
4 were the only party that was injured by their failure to
5 perform.

6 **THE COURT:** So if -- if I understand this correctly,
7 when Cisco first indicated they wanted you to bid on -- on the
8 opportunity to serve as a second source on LL III, your
9 response was, "Okay, let's talk to UMI, but it turns out UMI
10 are not quite ready to play LL III -- in the LL III game yet.
11 Let's try an LL II project. It doesn't have anything really
12 to do with Cisco, per se. Let's just build a relationship and
13 develop your expertise." Is that fair?

14 **MR. SHOHET:** Exactly right.

15 **THE COURT:** Okay.

16 **MR. SHOHET:** I think that is fair.

17 **THE COURT:** Okay. And I take it, though, that as
18 that LL II work was -- was -- was going on you -- you -- your
19 client was continuing to pursue the LL III opportunity with
20 Cisco, right? In other words, I'm trying to understand how
21 did you --

22 **MR. SHOHET:** Yeah.

23 **THE COURT:** -- continue to --

24 **MR. SHOHET:** Yes. Yes. The answer was -- yeah, I
25 don't know all the timing of when that -- you know, whether

1 there was a stop and a start --

2 **THE COURT:** Okay.

3 **MR. SHOHET:** -- whether we were because of the --
4 because we had put the UMI in training, whether, you know,
5 that had delayed --

6 **THE COURT:** Okay.

7 **MR. SHOHET:** -- our -- our pitch to Cisco on that.
8 I don't know all that. It's not in the record.

9 **THE COURT:** Okay.

10 **MR. SHOHET:** But I think generally that's probably
11 the way it worked.

12 **THE COURT:** We don't have much of a record here, so
13 I -- I'm not going to --

14 **MR. SHOHET:** Well, we -- you know.

15 **THE COURT:** -- criticize you for that yet.

16 **MR. SHOHET:** Yeah.

17 **THE COURT:** That's -- that's why we're here at an
18 early stage.

19 **MR. SHOHET:** Exactly.

20 **THE COURT:** So -- so in any event, at some point you
21 came to learn from Cisco that you weren't going to be the one
22 serving as second source --

23 **MR. SHOHET:** Yeah.

24 **THE COURT:** -- on LL III, right?

25 **MR. SHOHET:** And I want -- I'm glad you ask. I

1 didn't mean to cut you off.

2 **THE COURT:** No. No. That -- go ahead.

3 **MR. SHOHE:** It's -- it's important because there's
4 a lot of confusion in their papers about this, and it needs to
5 be cleared up.

6 What happened is yes, we did learn that we did --
7 first thing we learned -- and they say it's six months of
8 delay from the time we learned. That's wrong. What happened
9 in mid-2012 is that the -- and it wasn't even the RFQ we
10 issued yet, but it was the sort of the invitation to sort of
11 participate as a second source. The first indication that we
12 were go -- we had an opportunity to come back in was in mid-
13 2012.

14 It wasn't until -- and we probably -- I'm going to
15 take responsibility for being a little bit -- creating some
16 confusion here because it wasn't in our papers, but it is in
17 the complaint, Paragraph 33, Your Honor. Paragraph 33 of the
18 -- the complaint says in or about -- I won't read it.

19 It's -- it -- it addresses the point, which is it
20 wasn't until December 2012 that we learned that the submission
21 that we had made had been rejected, and that Mr. Lasserre had
22 the conversation with the customer representative who said,
23 "Well, you know, it went to some -- one of the original guys
24 on the LL III project," which of course was -- could only have
25 been us, had he seen our (inaudible) or UMI. So that was the

1 suspicion.

2 I think we've now got confirmation that -- that none
3 of this matters because we think that -- now they've all but
4 admitted that that's what they're doing.

5 So that's how that progressed, but -- so you raised
6 the point. Yes, mid-December was when the invitation to
7 participate -- the RFQ followed, and then we submitted at some
8 point -- the record isn't exactly clear on that -- but mid-
9 December -- I'm sorry, mid-2012 is not the operative date from
10 which we were on notice that they were probably violating the
11 agreement. That --

12 **THE COURT:** Your view is that that notice really
13 came no earlier than December of 2012?

14 **MR. SHOHEIT:** Exactly right. No earlier than, and --
15 and we -- but we didn't have -- we -- we thought we had some
16 action -- we -- here's what -- here's -- let -- let me answer
17 the question that --

18 **THE COURT:** Yeah.

19 **MR. SHOHEIT:** -- if I were the Court, I'd put to me
20 is well, what happened after that? Why -- what counts for the
21 delay?

22 So we certainly have some obligations to the Court
23 and to the -- to our client and to the -- to UMI, not to
24 accuse them of things that are based on half -- you know,
25 half-baked investigations, so we did what we could to try to

1 chase it around.

2 And remember, we wrote them a letter. We wrote them
3 a letter reasonably promptly, mid -- mid-January. And we
4 said, "Look, here's what we got. We're really concerned about
5 it. We're doing an investigation, you know, can you please
6 help us? What are you doing" --

7 **THE COURT:** I need to interrupt you just a moment.

8 **MR. SHOHE:** Sure.

9 **THE COURT:** Mr. Rivera.

10 I'm sorry, counsel, go ahead.

11 **MR. SHOHE:** Give me a chance to get some water
12 here. Thank you.

13 **THE COURT:** Okay.

14 **MR. SHOHE:** I'm talking a lot here. So -- so I was
15 in talking about what we did. Let's -- let's follow the --
16 let's follow the dates out.

17 **THE COURT:** Go ahead.

18 **MR. SHOHE:** So mid-2012, we get involved.

19 December of 2012, we suspect, and we just have a
20 suspicious. Now, if I -- if I had brought the TRO at that
21 point on those facts without having said I've done what I can
22 to investigate, I -- I haven't sent them a letter, I haven't
23 done other things that I can reasonably get more information,
24 you'd probably denied a TRO, and you'd be right because I
25 hadn't done what I should do and that's my obligation.

1 So at that point, we started to -- we wrote the
2 letter. We -- well, first of all, we did what we could do in
3 the investigation. I guess, there was some calls made and
4 some inquiries done and, you know, what could be done was
5 done. And by mid --

6 **THE COURT:** May I ask?

7 **MR. SHOHET:** Sure.

8 **THE COURT:** Was a -- was any communication initiated
9 with Cisco to -- to file --

10 **MR. SHOHET:** I don't know the answer to that. Well,
11 I mean -- did you? What -- did we -- did we try to follow up
12 with Cisco on that or no?

13 **UNIDENTIFIED SPEAKER:** They would not mention who
14 the competitor was or --

15 **THE COURT:** But did we ask? I'm just --

16 **UNIDENTIFIED SPEAKER:** We -- well, I absolutely
17 asked who -- who's has been awarded this, and they would not
18 tell us. They just said it was a -- they said it was an
19 experienced DRAM designer is all they said.

20 **THE COURT:** Okay. Go ahead. I'm sorry.

21 **MR. SHOHET:** So I don't -- I can't remember
22 specifically what was done, but we did what we could. We
23 finally get a letter out on January 14. We write them a
24 letter, and we asked them the pertinent questions.

25 And they didn't answer the pertinent questions. In

1 fact, they threw it back on us. "You breached. You didn't
2 issue wafer starts. It was a material breach," and blah,
3 blah, blah. You know, come on. "This was a benefit for us.
4 We paid you for work and you did the work, and when it became
5 unable for you to do the work because your parent screwed up,
6 you know -- you know, how did we materially breach?" But that
7 was what they told us instead of telling us what they were
8 doing.

9 So that brings us to the end of January. And then
10 we did some additional work then to get the complaint ready,
11 and we got the complaint finally on file on, what was it,
12 March 8th?

13 **UNIDENTIFIED SPEAKER:** Correct.

14 **MR. SHOHEIT:** And then here we are. And you'll
15 notice that our investigation continued because the papers
16 that we filed in connection with this proceeding have
17 additional detailed facts that we didn't have in the
18 complaint, but, you know, we're trying to do this all in real
19 time. So --

20 **THE COURT:** Right.

21 **MR. SHOHEIT:** -- you know, I know we have to act
22 quickly and we did the best we could.

23 **THE COURT:** So standing here today on March 28th,
24 2013, what's the confidential information that they have
25 misappropriated or misused or trade secret that you believe

1 they have taken that belongs to you?

2 **MR. SHOHET:** Well, we'd like to get some expedited
3 discovery to be able to answer that question. We're kind of
4 flying blind.

5 But the question now is, based on what we have said
6 and what we do know, is there a reasonable basis to infer or
7 presume that they are using confidential information?

8 And let's not forget, Your Honor, that the -- that
9 the -- the noncompete obligation does not require such a
10 showing. It's only the confidentiality obligation.

11 The noncompete, which should be entered -- which --
12 which would support the entry of the injunction today requires
13 a finding of the Court only that they are engaged in the
14 project involving an LLDRAM.

15 **THE COURT:** And what evidence do I have in the
16 record that they have, in fact, violated? As I understand it,
17 you have one comment from --

18 **MR. SHOHET:** Well --

19 **THE COURT:** -- Cisco indicating that an original guy
20 --

21 **MR. SHOHET:** Let's look at their --

22 **THE COURT:** -- was awarded the contract.

23 **MR. SHOHET:** Let's look at their papers.

24 **THE COURT:** Okay.

25 **MR. SHOHET:** I think they're helping us a little bit

1 here. Let's look at paragraph -- well, turn to page 11.

2 **THE COURT:** All right.

3 **MR. SHOHE:** Starting on line 10. They go on and
4 talk about this projects, and then they say, "In other words,
5 GSI is asking this Court to issue an order that could expose
6 UMI to breach of existing contracts when there is nothing more
7 than unsubstantiated speculation that UMI even has GSI
8 confidential information, let alone is sharing it with a third
9 party."

10 Well, what's wrong with that statement is it
11 constitutes an admission by them because they're saying that
12 the injunction would expose them to a breach of contract.

13 The injunction would only expose them to a breach of
14 contract if they are acting in violation of the noncompete
15 because it says with the injunction we're asking is to "stop
16 any projects in which they are currently involved involving
17 LLDRAM technology." I'm paraphrasing, but that was the intent
18 to deal with that.

19 So the issue in -- it won't hurt them if they're not
20 violating. If they are violating, it will hurt them. We
21 don't know, but we think that's a fair, at this stage, way to
22 protect everybody is to, you know, just have it done that way.

23 They're admitting in this statement and others --
24 they also, Your Honor, remember, in their papers they talk
25 about the balance of harm tipping in their favor because of

1 all the harm that would be visited upon them in shutting them
2 down on existing contracts if they were to be enjoined.

3 So there's two admissions in here that would support
4 the entry of the -- immediately of the TRO.

5 **THE COURT:** So you're saying that by entering into a
6 -- or by acknowledging that there could be an existing
7 contract, they are acknowledging a breach of the noncompete?

8 **MR. SHOHET:** Well, I think so, Your Honor, but you
9 know, I -- let me just deal with it at a higher level.

10 We asked them what they were doing. They didn't --
11 they didn't tell us anything. Apparently, they've got
12 something that concerns them, and they didn't even tell the
13 Court.

14 **THE COURT:** Well, perhaps what's concerning them is
15 the possibility of a temporary restraining order, which unduly
16 infringes upon their right to engage in commercial activity?

17 **MR. SHOHET:** Well --

18 **THE COURT:** That -- that may be the concern I
19 suspect they have --

20 **MR. SHOHET:** Absolutely.

21 **THE COURT:** -- on top of mine.

22 **MR. SHOHET:** And they should defend that on the
23 merits. They -- if they -- if they have a defense to that,
24 then they should come out and say, "Yes, this is what we're
25 doing. We're working with this customer. Yes, it's a

1 competitive reviewer's, yes, it's an LLD RAM or no, it's not an
2 LLD RAM," but don't hide behind these words and -- you know, we
3 asked them the question. Okay. They blew us off. That's why
4 we're here.

5 Then they came to the court, and they still haven't
6 answered the question, but they've said that the injunction
7 would kill them. Now, how could the injunction kill them, in
8 terms of the balance of harm, if they're not doing the thing
9 that the noncompete prohibits?

10 Remember, the noncompete doesn't require any
11 confidential information be used. It's clear and simple.
12 Don't work on an LLD RAM project, period.

13 **THE COURT:** Well, it would -- it could -- it -- it -
14 - it could kill them or unduly harm them if there's no
15 contract enforced because, as I understand it, the noncompete
16 under the survival clause, if properly -- if the contract had
17 been properly terminated would not allow you to come in a
18 couple years after the fact?

19 **MR. SHOHET:** No. No.

20 **THE COURT:** So your belief is that even if the
21 contract was absolutely properly --

22 **MR. SHOHET:** Yes.

23 **THE COURT:** -- terminated, the noncompete runs
24 through April 30th?

25 **MR. SHOHET:** Yes. It's the survival provision, Your

1 Honor. The survival provision says -- look, it says that
2 those -- these are Article XI provisions. It says that they -
3 - certain provisions survive the expiration of the contract,
4 and certain provisions last only to the -- to the expiration
5 of the contract.

6 The noncompete obligation in the survivability,
7 which is briefed in the -- in -- in our papers, and you can
8 read it. I mean, I can -- if you want, I can -- we can read
9 it together, in case there's a question. I don't think
10 there's much of a question on that one. I don't think that's
11 controversial. The provision -- Chris, do you know the
12 citation to this?

13 **MR. BEAL:** 7.5.

14 **MR. SHOHET:** 7.5. So 7.5 -- 7.5 says, "The
15 provisions of Articles III, IV and V of this agreement," and
16 the noncompete is in -- I believe that's five, right?

17 **MR. BEAL:** Three.

18 **MR. SHOHET:** Three. I can't get the numbers right,
19 but I get the concept, hopefully.

20 "The provisions of Articles III, IV and V of this
21 agreement shall survive expiration or termination of this
22 agreement permanently." They live forever.

23 Now, that's broad group of things, some of which can
24 last forever and some of which cannot. I can see their point
25 that a noncompete cannot last forever.

1 So the way I get there then is to say but it could -
2 - should certainly last the period of time they agreed it
3 would last, and that says for the term of the contract. The
4 term of the contract expire -- has not expired. The term of
5 the contract was five years.

6 And it says in the provision, Your Honor, that it
7 survives any termination, "right or wrong." In other words
8 any purported termination, whether it was right or wrong -- we
9 think it was wrong because it was based on our --

10 **THE COURT:** Sure.

11 **MR. SHOHET:** -- material breach, which was not a
12 material breach.

13 But even if it were a material breach, Your Honor,
14 and even if it were properly terminated, when you read that
15 provision, it says the -- it goes to the term of the contract,
16 whether it was early terminated or not, for good or bad
17 because that's the period of time that the parties reasonably
18 agree it would take to dissipate, if you will, or mitigate any
19 of the effects of the -- of -- of our bringing them up to
20 speed.

21 **THE COURT:** So your theory is that they have
22 admitted their engaging activity, which it violates the terms
23 of this provision, the only -- is that correct?

24 **MR. SHOHET:** Absolutely.

25 **THE COURT:** Okay. And that admission, as you

1 characterize it, comes about because you have brought a claim
2 accusing them of that very act, right?

3 **MR. SHOHET:** Well, it's more than that. It's
4 because they say that the Court shouldn't enter the injunction
5 because the effect of the injunction would be to force them
6 into a breach of contract. How could that be?

7 **THE COURT:** But your breach -- but your injunction
8 goes beyond simply -- at least as requested, goes beyond
9 simply enforcement of the noncompete provision, right?

10 **MR. SHOHET:** Well --

11 **THE COURT:** You're asking for an injunction relating
12 to your -- to the confidentiality clause as well?

13 **MR. SHOHET:** We don't need that yet. That's not --
14 today we should get --

15 **THE COURT:** I understand. In terms of understand
16 the effect or import of the admission of the other side,
17 right, you would agree with me that the injunction as
18 requested goes beyond the noncompete?

19 **MR. SHOHET:** This is the first time I'm going to
20 disagree with the Court. The non --

21 **THE COURT:** Probably not the last, but go ahead,
22 yeah.

23 **MR. SHOHET:** So if you'll allow me to?

24 **THE COURT:** Go ahead.

25 **MR. SHOHET:** The noncompete -- let's be clear about

1 that. If they have violated noncompete by engaging in an
2 LLD RAM project today, we don't need the confidentiality
3 obligation. They should be enjoined at -- all we have -- all
4 that has to happen to enter that injunction is the fact that
5 they've admitted virtually, and that is that they are engaged
6 in an LLD RAM project. If they are, the term of the contract
7 has not expired.

8 Whether or not it was properly terminated in 2009
9 doesn't matter because it lasts until April 30, and it
10 supports the injunction independently, and this injunction
11 should survive beyond April 30 based on the case law we cited
12 before.

13 So these are alternatives -- the non -- the
14 confidentiality obligation and the common-law protection for
15 our own intellectual property, which is defined in the
16 contract, that's all irrelevant. We don't need that. Those
17 are fallback.

18 If you don't find the noncompete -- and I don't know
19 how you can find the noncompete invalid -- I don't mean to
20 presume -- because their position is that it -- it's not
21 enforceable because they terminated it. Well, they didn't
22 terminate it correctly, and even if it did it doesn't matter.

23 And secondly, that it was -- the termination was
24 predicated on a material breach, which we didn't commit.

25 So we should get the injunction on the -- on the

1 noncompete, and the rest of it doesn't matter. The question -
2 - and it should last forever as to these guys. The point is
3 if we --

4 **THE COURT:** Well, is that correct?

5 **MR. SHOHET:** Yes.

6 **THE COURT:** Are you saying that the injunction I
7 should issue at this stage would be a permanent injunction?

8 **MR. SHOHET:** As to any projects that they are
9 currently engaged on. Look at those cases we cite. They have
10 -- if they have violated our rights, and they're currently --
11 it's all (inaudible). The injunction we ask is only to stop
12 continuation of existing projects because we don't know more
13 yet.

14 **THE COURT:** So in your view, if I issue the
15 injunction you wanted on the noncompete, could they start a
16 new project on May 15th?

17 **MR. SHOHET:** Well, if they --

18 **THE COURT:** Without violating the noncompete
19 provision?

20 **MR. SHOHET:** The new project certainly wouldn't be
21 covered by the noncompete. We'll concede that.

22 There's arguments we could make about -- because it
23 says last -- it says it would last permanently, but we think
24 permanent can't be broader than the period of time they
25 agreed, which was term of the contract. I mean, we could make

1 arguments, but I don't want to make argument -- clever
2 arguments today. I want to be real about it.

3 Probably that -- that project is done. They say
4 "contract or contracts." Whatever contracts are underway, our
5 position is the injunction should issue on the noncompete
6 subjective and that it should last indefinitely. They're --
7 they're -- they're done with those projects.

8 But we also don't know what other mischief may be in
9 the works -- and I don't mean to be disparaging here -- but
10 whatever other projects that they may have in the works or
11 contemplated. And were they to engage after April 30, then
12 the question would come up, well, are they in breach of the
13 non -- the confidentiality obligation, or what common-law
14 rights do we have because they are misusing potentially our
15 property?

16 That would come up -- the only thing I'd add to that
17 is, Your Honor, because everything they learned about DRAM
18 technology was done on our nickel. As we said, at least in
19 the papers, this was their first project.

20 I wouldn't -- I would say that it's a fair
21 presumption that says if they're doing it after April 30 at
22 this point, it's all ours. And -- and the presumption is that
23 they're using our confidential information because our
24 confidential information was everything they learned from us,
25 which is everything they know about LLD RAM, as far as we

1 should -- it's a fair presumption.

2 And maybe in two or three years whatever things they
3 learn on projects that they're not in violation of us, maybe
4 that would be a question of fact that would have to be sorted
5 out, and, you know, maybe we should do some discovery before
6 we make presumptions, but I think you start from the
7 proposition that it's going to be awhile after 2000 -- April
8 of 2008 before they get to do an LLDRAM project without
9 violating this contract.

10 **THE COURT:** All right. Mr. Shohet, I'm going give
11 an opportunity to rebuttal, but I would like --

12 **MR. SHOHET:** Thank you.

13 **THE COURT:** -- to hear from Mr. Cherian. Thank you
14 very much.

15 Mr. Cherian, I suspect you have a different view?

16 **MR. CHERIAN:** Yes, Your Honor. But, Your Honor,
17 first I'd like to -- I know the Court would like to welcome a
18 new generation of lawyers all sitting here watching us.

19 **THE COURT:** Here's your chance to either inspire or
20 completely discourage anyone from practicing law.

21 **MR. CHERIAN:** We hope, Your Honor, they'll go back
22 home and -- and plan to become lawyers.

23 So Your Honor, there's a lot of statements that are
24 made here that are flat not true, unfortunately, not true.

25 And we can go through -- he tells you that his

1 client was the -- is an expert in LLDRAM, right, but his
2 papers don't tell you that because he not. His papers never
3 tell you that he's an expert in LLDRAM.

4 He tells you that he contracted with us for a
5 design, and that design work ended in December of '08, and
6 that was it. Flat wrong, Your Honor.

7 What he contracted with us for, he took a micron
8 part. He took the specification of a micron part. Why would
9 you do that if you're such an expert? An existing micron
10 part, and he said, "Here's the spec" -- and it's in the
11 papers. "Here's the spec. Take it and build me something."
12 That's what he said. That's a fair read.

13 Now he tells you all about ProMOS and it was all
14 because ProMOS was the parent company. That's what he tells
15 you. Well, let's look at it. Let's -- let's look at -- it's
16 not true, simply not true.

17 Page 3 of the contract. "If the product is designed
18 for manufacturer at a fab other than ProMOS, provide design
19 (inaudible). So we just need to go look at the contract, Your
20 Honor.

21 Right now we look at the evidence before the Court.
22 We stand on our papers. Why say there is no evidence of any -
23 - of any significance. And I think, you know, it took a long
24 time to get those papers ready in a day, and we got it to you
25 as quickly as we could, and we stand on our papers, but that's

1 the first thing, see.

2 Contracts with us for a micron part because he
3 doesn't know how to do it, right. Why would you want -- if
4 you could do it yourself, why do you want to give us any
5 money?

6 Second, he tells us he selected us because of
7 ProMOS. No, he selected us because we are well known design
8 house. We design DRAMs. That's our business. We do paper
9 designs. That's what we do every day.

10 **THE COURT:** Is it correct, Mr. Cherian, though, that
11 prior to this opportunity relationship, your client had not
12 done any LD III design work --

13 **MR. CHERIAN:** Well --

14 **THE COURT:** -- or LD II, for that matter?

15 **MR. CHERIAN:** Well, we were working with Cisco
16 before we worked with them. They came to us because they knew
17 we were working with Cisco, and they knew we were experts at
18 DRAM. And they didn't know -- they don't know how to do an
19 LLD RAM. They wouldn't give us this money.

20 Now, when he told you, Your Honor, which is really
21 regrettable, that, "Well, we got the design and that was the
22 end. Go home." Not true.

23 What -- if you go back and look at the -- you go
24 back and look at two paragraph -- I mean, Article II, it says,
25 "Provide consulting services of failure analysis efforts,

1 undertaken by GSI on a timely basis. That these negotiated in
2 good faith for a period of three years after manufacture and
3 release."

4 So put this in perspective. What he did is he came
5 to us. He says, "Look, I want you to build me a particular
6 product. The spec -- I don't know how to spec it. I'll use
7 the micron spec," okay. Because if he knew how to spec it, he
8 would given -- he would give me spec. He says, "I'll use the
9 micron spec and you go build it," and he sets forth a series
10 of steps to manufacture.

11 And what he now does is he comes to a point after
12 that \$540,000 has been spent and, for whatever reason, he
13 tells us it's because of ProMOS. Well, if we go and did a
14 Google search -- and Google search is not evidence, so I guess
15 -- but we'll see that ProMOS was still selling these products
16 in '11 and '12.

17 **MR. SHOHET:** Excuse me, Your Honor, just a quick
18 objection to the record.

19 There's no declarations in -- with their papers.
20 None of this is in evidence. None of this is in record, so I
21 just want to preserve. I don't know if --

22 **THE COURT:** Your record is preserved.

23 **MR. SHOHET:** Thank you.

24 **THE COURT:** I -- I take your point.

25 Go ahead, Mr. Cherian.

1 **MR. CHERIAN:** Your Honor, I appreciate it again.

2 So ProMOS was still in business, you see, so we
3 don't know -- that's what they say, and we -- what we have to
4 work with is the evidence they put forward before us. That's
5 all the evidence is.

6 Now, with regard to them being experts, let's look
7 at the recitals of the -- of this contract. This great
8 expertise that they have. You know they're LLDRAM experts.
9 They know how to do it. That's why they gave us the micron
10 part because -- and in the recitals they say -- and you know
11 we guys are just novices. We just came up -- you know, we
12 fell off the turnip truck just yesterday, but the recital say
13 something else.

14 UMI is experienced in the development and design of
15 semiconductor memory components, you see, and UMI's employees
16 have expertise in the design of semiconductor memory
17 components. Now, what's their experience? What they recite.
18 It's their contract.

19 Their experience is in the production, not the
20 design, the production, packaging and sales, right. There's a
21 big difference, Your Honor, in production, packaging and sales
22 versus design.

23 So a company who claims -- I'm not disparaging them
24 -- who claims to be able to produce these products wants
25 someone to design the products for them, presumably because

1 they don't have the expertise in-house.

2 **THE COURT:** But Mr. Cherian, that's hardly unusual
3 that partners to a business arrangement would bring
4 complimentary skills --

5 **MR. CHERIAN:** That's right.

6 **THE COURT:** -- rather than overlapping skills,
7 right?

8 **MR. CHERIAN:** That's right. Absolutely. It happens
9 every day in this valley. Different people do different
10 things. Okay.

11 But the point I want to make is -- is I want to put
12 on the table this notion that there was this great expertise.
13 There's nothing in the declarations that suggest it. I'll go
14 out on a limb and suggest to you it's not true. The a little
15 bit of research that I've done suggests it's not true.

16 And I will also tell you, Your Honor, that UMI has
17 done generations of DRAM design. It's been involved in DRAM
18 designs. That's their bread and butter. That's what they
19 live for.

20 With respect to the admissions, I don't see the
21 admissions, Your Honor. He wants discovery into all kinds of
22 contracts.

23 You, I think, seized on the Low Latency DRAM. You
24 asked the question, which was not answered because I can't
25 answer it either. What's the difference between LLDRAM II and

1 LLDRAM III, other than the obvious, the response time, which
2 is -- I'm guessing.

3 **THE COURT:** I'm guess --

4 **MR. CHERIAN:** I don't want to --

5 **THE COURT:** I -- and I'm guessing too. I take it
6 that the response time or latency of version III or generation
7 III is somewhat enhanced compared to generation II? Can we
8 just --

9 **MR. CHERIAN:** That's my presumption --

10 **THE COURT:** Okay.

11 **MR. CHERIAN:** -- also, Your Honor. If I could just
12 take a moment?

13 And it's not defined. There's no definition of that
14 -- and even though, Your Honor, you asked -- you know, it's
15 just common sense that if you're in the business of designing
16 and selling DRAMs, be it Samsung, High Max, anybody, LG, you
17 know, any of the LP -- anybody, you want to have a DRAM that
18 has a very short response time, right, because -- so Low
19 Latency II, Low Latency III, it doesn't mean something
20 specific to me, you know. The -- the -- the (inaudible) are
21 not bound.

22 But more importantly, we need to -- you know, since
23 you -- you know, I suspect you want me to get into the merits?

24 **THE COURT:** I am kind of interested in the merits,
25 Mr. Cherian, so -- so why don't we turn to the -- the

1 contract.

2 In particular, I think Mr. Shohet suggested, perhaps
3 even persuasively, that at -- at a very minimum, the
4 noncompete provision survives termination and runs through
5 April 30th.

6 Could you -- could you give me your view of how that
7 contract --

8 **MR. CHERIAN:** Yeah. We --

9 **THE COURT:** -- provision works?

10 **MR. CHERIAN:** We don't -- frankly, we disagree with
11 it with it, Your Honor.

12 There was a contract for five years where all five
13 years, or most of the five years, we would be productively
14 engaged, right. For whatever reason -- maybe it's a breach,
15 maybe it's by mutual consent. I can't make a representation
16 to the Court today. But for whatever reason, the project
17 didn't go forward.

18 It did go forward on -- on projects that were in
19 their part, were -- that was in their (inaudible), and so that
20 ended it. So -- so to -- to me, there's nothing more to do.
21 They ended the project.

22 And if you go back and look at the provision,
23 Kubida's -- Kubida's letter sets it forth, I think, very well,
24 Your Honor. I think he sets it -- but if you go back and look
25 at 7.3, you got 30 days notice. That's the notice provision.

1 So you've worked with these guys -- and we're not
2 enemies with these guys. We want to work with them again. I
3 mean, we -- that's our business. We work -- we produce
4 designs for people who employ us.

5 So the design -- the work is done. They've decided
6 not to go forward. We didn't sue them for breach. We did
7 nothing. We sent them a letter, and we said pretty simple.
8 The letter is a two-liner, and I'm sure the -- I mean, it's a
9 four-liner.

10 It says, "This letter is to inform" -- it's very
11 polite -- "GSI that UMI considers the agreement titled" blah
12 "to be terminated 30 days after you received this letter."

13 Why? Because nothing is happening. You guys have
14 decided you don't want to product. You know, you're not going
15 ahead. We're good guys. We understand, you know, these
16 things happen and -- but there's no contract. You know,
17 there's nothing in us. We'll go off and do other things.

18 **THE COURT:** But even if that's true, doesn't the
19 noncompete run through the end of this month?

20 **MR. CHERIAN:** We don't -- we don't -- we -- first of
21 all, Your Honor, we have to think about noncompete. We gave
22 them a design. We're in the business of making designs. We
23 do -- everything is a custom design, right. And so we get
24 into this business of Low Latency, High Latency, DRAM. All
25 these things are terms that are not defined by them in their

1 papers.

2 So the termination -- you see, if we were working
3 with them, then there would be some basis for it. And as
4 Kubida points out, once the agreement was terminated, all
5 rights and -- all obligations ended.

6 And what did they do with it, Your Honor? They --
7 if you believe their papers, they took the work we gave them
8 and either did nothing with it, nothing with it, or they used
9 to go forward with that divide bid. But, again, there's a
10 difference because their papers inform us there's this level
11 II latency and level III latency -- no, Low Latency II, low
12 latency III, so they went. They lost it.

13 Now, they can't tell you one thing we've done that's
14 improper. They can't. They -- in the declaration -- one of
15 the -- the declarant says this woman did some simulation.
16 That's somehow trade secret. Your Honor, you know what
17 simulation is. A DRAM circuit is hundreds of pages, okay.
18 It's about this thick. You know, I'm just -- this thick, long
19 papers.

20 And what you do in simulation and testing is you
21 take individual circuits to make sure that the electrical
22 parameters -- it's our -- it's our design. They're just
23 assuring us that those things -- that the circuit works as
24 it's supposed to, the electrical metrics, for lack of a better
25 word, are correct. That's this -- that's what they did for

1 us.

2 You see, it's our design. The design is completely
3 ours, a customized design for a particular client that went
4 nowhere. And now what they want to do years later is to come
5 back and prevent us from doing business. That's what it's all
6 about.

7 **THE COURT:** All right. Mr. Cherian, do you want to
8 speak to the issue of discovery and what discovery would make
9 sense, in the event the Court were to decline the TRO, but set
10 a very short timeframe for a PI hearing?

11 **MR. CHERIAN:** Well, Your Honor, we --

12 **THE COURT:** I'm going to give Mr. Shohet a chance to
13 speak to it as well, but I want to hear your thoughts as well.

14 **MR. CHERIAN:** Yeah. To me, Your Honor, it seems
15 that we have shown to you conclusively there's no basis for a
16 TRO. That there's no reason why this case can't proceed on
17 its normal -- on its normal course.

18 That the information, to the extent the information
19 is legitimately required if the suit goes forward, you know,
20 would have to be turned over, but there's no reason for this
21 sense of urgency. There's not one iota of urgency, Your
22 Honor, for this, because, by their own admission, what they
23 tell you is well, this contract will -- we believe it
24 terminated in '09, but you know, even if you take their word
25 and you accept their argument in the -- what, in the next 30

1 days, or something, 34 days, this -- you know, by their own --
2 by their own accord, that's the end of the agreement.

3 But I think -- Your Honor, I think that Kubida --
4 the Kubida letter sets it forth clearly, you know. You know,
5 we can give you the 30 days. Here's the 30-day notice. Good-
6 bye.

7 **THE COURT:** All right. All right. Mr. Cherian, I
8 appreciate your argument.

9 I'm going to give Mr. Shohet a chance to rebuttal.

10 Thank you very much, sir.

11 **MR. CHERIAN:** Thank you, Your Honor.

12 **MR. SHOHET:** Very quick a few points. Very quickly,
13 Your Honor. I know that we've probably taken up more than our
14 fair share of the Court's time this morning.

15 The recitals. There's binding admissions between
16 the parties. Mr. Cherian made an argument that somehow, you
17 know, we weren't anything special and there was no
18 understanding or obligation that -- that they were going to be
19 -- we were going to be imparting information that they could
20 use.

21 Recital G says -- and this is an admission of fact
22 by both parties. That's the effective recital in the
23 contract. "UMI and GSI acknowledge that because of UMI's
24 position as a contract memory design service provider, the
25 exposure UMI will gain in the course of providing contract

1 design services to GSI -- services to GSI's confidential
2 proprietary information and trade secrets, and you UMI's
3 potential ability to use said information to assist potential
4 competitors of GSI to produce low latency" -- you know, it
5 goes on, but the point is --

6 **THE COURT:** I can read it. I understand. Yeah.

7 **MR. SHOHET:** Yeah. It completely contradicts Mr.
8 Cherian's major point that there was nothing special about
9 what we were going to do for them or with them, and that they
10 -- this is a surprise to them that somehow we're trying to
11 protect us.

12 The other thing I want to say -- the other provision
13 I wanted to talk about is they say it's not defined. What it
14 -- their DRAM -- they've been doing lots of DRAM work, and
15 it's not defined what an LLD RAM -- it's specifically defined
16 in Section 3.6.

17 It says, "Except for the product being designed and
18 developed," blah, blah, blah, "they should not during the term
19 of this agreement being involved in" -- I'm just paraphrasing
20 -- "Low latency DRAM product means a latency optimized and/or
21 address rate optimized memory product that employs a capacity
22 charged based memory self-technology, including but not
23 limited to," and then it goes on.

24 I don't know what any of that means but I know this
25 --

1 **THE COURT:** That makes two of us.

2 **MR. SHOHET:** Okay. But we do know this.

3 **THE COURT:** Yeah.

4 **MR. SHOHET:** It's the definition of what they're not
5 supposed to do. Either they're doing that or they're not
6 doing that. If they're not doing that, there's no problem.
7 There's no hardship to them.

8 If they're doing it, they got to stop. They can't
9 do it, period. It's not -- it doesn't require a lot of debate
10 or even discovery. It's a simple question. We asked them the
11 simple question. They haven't told us and they haven't told
12 you. I think we need an injunction right away.

13 The only other thing that I wanted to mention --
14 that's it. Those are my only points.

15 **THE COURT:** All right.

16 **MR. SHOHET:** Thanks, Your Honor. Well, wait -- wait
17 --

18 **THE COURT:** Mr. Beal may have a different view?

19 **MR. SHOHET:** Oh, did you want -- did you want me to
20 address --

21 **THE COURT:** It's all right. Just a minute.

22 **MR. SHOHET:** Okay. Sorry.

23 **THE COURT:** Go ahead, counsel.

24 **MR. SHOHET:** You wanted me -- maybe you wanted me to
25 address the discovery question?

1 **THE COURT:** I want to speak to discovery, yes.

2 **MR. SHOHE:** Yeah. So we don't see any reason why
3 the documents we requested can't be produced immediately, you
4 know, or within a matter of a few days from them.

5 These are the documents that would -- that were
6 described in -- I think -- did we not -- we described them
7 fairly accurately in the papers.

8 We'd like to see the basic documents. What did --
9 what's their contract terms? They can -- we can do it on a
10 confidentiality agreement. We can negotiate something. We
11 won't -- we'll keep it attorneys' eyes only, so that there's
12 no exposure at this point.

13 Who they're working with. What the -- what the
14 documents that reflect the deal and the exchange of
15 information and their performance. That will give us a start.

16 And I think we also asked for a 30(b)(6) witness
17 that's most knowledgeable about what they're doing and, you
18 know, can -- can speak to what it is that's going on.

19 And we would think that that could be done -- we'd
20 like to get the documents first and quickly, and then possibly
21 have a short deposition, all of which -- you know, obviously
22 the sooner the better, but you know, as long as we get -- if
23 we get the TRO, it doesn't matter. If we don't, the sooner
24 the better.

25 **THE COURT:** All right. Well, here's what we're

1 going to do.

2 I am not yet convinced that injunctive relief is
3 warranted. My particular concern is I still at this point
4 don't have any understanding of what it is the Plaintiffs
5 believe the Defendants have done to trigger their obligations
6 under the agreement, so on that basis the TRO is denied.

7 However, I am concerned about these allegations, so
8 I do believe a preliminary injunction schedule is appropriate
9 and warranted.

10 I'd like to set a hearing for preliminary
11 injunction, and what I'd like to do is set that hearing for
12 something like three months from today, give or take.

13 I think limited discovery in support of that
14 preliminary injunction is warranted, mutual discovery, I
15 should say, including documents, email and depositions, but I
16 want to be very clear about what documents and depositions I
17 think are appropriate.

18 I don't see this as requiring massive scouring of
19 hard drives and email custodians. I think a small number,
20 perhaps five or less, of -- of custodians for email purposes
21 is warranted.

22 I think limited targeted discovery regarding the
23 contract is warranted, and perhaps other contracts, as well,
24 and perhaps three, maybe four depositions, either 30(b)(6) or
25 individual, perhaps an expert or two.

1 From my comments, I think you can see that I am
2 inclined to set very strict limits, but I do want to give
3 counsel an opportunity to meet and confer on what they think
4 the right discovery should be within those general parameters
5 or with that general guidance.

6 So Mr. Rivera, can you suggest a hearing date
7 roughly three months from today?

8 **THE CLERK:** Yes, Your Honor. Tuesday, June 25th at
9 10 a.m. is available.

10 **THE COURT:** Okay. So we're going to set this for
11 hearing on Tuesday, June 25th at 10 a.m.

12 I'm going to ask counsel to meet and confer on a
13 discovery plan, consistent with the general guidance that I've
14 provided.

15 If you can't work it out, let's plan to have a
16 telephonic hearing in roughly a week for -- for status. I say
17 telephonic. I'm eager and always happy to have counsel here
18 in the courtroom, but if for some reason it's more convenient
19 to participate by phone, I'm open to that as well.

20 So does everybody understand the general parameters?

21 Mr. Rivera, can we just go ahead and set a status
22 right now so that everybody has it on their calendar?

23 **THE CLERK:** Yes, Your Honor. Tuesday, April 2nd at
24 10 a.m.

25 **THE COURT:** All right. So, gentlemen, do you

1 understand the basics of what we're talking about?

2 I'd like to meet and confer. I'd like to have a
3 status conference in a week to understand whether you've been
4 able to work out the discovery plan or not.

5 If you haven't -- well, if you have, submit it, and
6 I'll -- and I'll -- submit it in the form of a stipulation and
7 I'll approve it.

8 If you haven't or can't, let's plan to address what
9 discovery makes sense at that status conference next week.
10 And with that, we'll get to discovery, and we'll eventually
11 get to a hearing.

12 Mr. Cherian, do you wish to say something?

13 **MR. CHERIAN:** Yes, Your Honor. With regard to the
14 date next week, I'm not available next -- I mean, for the -- I
15 have a federal circuit argument that I --

16 **THE COURT:** If it doesn't work for you or for
17 opposing counsel, I'm happy to consider alternatives, either
18 if you want to propose a date today or if you want to reach
19 out to Mr. Rivera this afternoon or tomorrow. I'm flexible in
20 this regard. I want to accommodation everyone's calendar.

21 **MR. CHERIAN:** A week -- a week from the date you
22 have would work for me.

23 **MR. SHOHET:** Well --

24 **MR. CHERIAN:** (inaudible) the ninth.

25 **MR. SHOHET:** Why don't we do this, Mr. Cherian. I

1 don't know all the dates that may be perfect or conflict with
2 my calendar. Why don't we talk about that and propose some
3 dates that make sense within those parameters, talk outside?

4 **MR. CHERIAN:** Fine.

5 **MR. SHOHET:** Is that okay?

6 **THE COURT:** Okay.

7 **MR. SHOHET:** Is that okay with the Court?

8 **THE COURT:** That's more than okay.

9 All right, gentlemen. I appreciate the
10 presentations this morning. Have a good morning.

11 **MR. SHOHET:** Thank you, Your Honor.

12 **MR. BEAL:** Thank you, Your Honor.

13 **MR. CHERIAN:** Your Honor, are you going to issue an
14 order?

15 **THE COURT:** I will issue a very short order
16 consistent with my ruling here on the record.

17 **MR. CHERIAN:** Okay. Thank you, Your Honor.

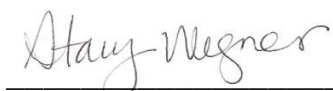
18 **THE COURT:** Okay.

19 (Proceedings adjourned at 11:03 a.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U. S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



4/18/13

Signature of Transcriber

Date